

IN THE HIGH COURT OF DELHI

RSA No.6/2005

M/s. GMB Packaging and
Printing Pvt. Ltd. Appellant
! through: Mr. Vinay Kumar Garg, Advocate

VERSUS

\$ Mukesh Puri Respondent
^ through: Mr. Ravi D.Sharma, Advocate

RESERVED ON: 07.12.2007

% DATE OF DECISION: 12.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.**

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1. I need to answer the following substantial question of law:

“Whether in view of the evidence on record findings returned by the learned Trial Judge and as affirmed by the learned Appellate Judge are sustainable?”

2. Since the legal issue relates to appreciation of evidence I prefer to preface my decision with a restatement of the legal position as to under what circumstances appreciation of evidence partakes the colour of substantial question of law

and when is the Appellate Court entitled to interfere with the findings of fact.

3. Noting 2 earlier decisions reported as AIR 1951 SC 120 Sarju Parshad Ramdeo Sahu Vs. Jwaleshwari Pratap Borain Singh and AIR 1983 SC 114 Madhusudan Das Vs. Narayanibai; in the decision reported as 2001 (3) SCC 179 Santosh Hazari Vs. Purushottam Tiwari the Hon'ble Supreme Court, in para 15 observed as under:-

“15. - - - - - As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See Madhusudan Das V. Narayanibai (1983) 1 SCC 35). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial judge on a question of fact. (See Sarju Pershad Ramdeo Sahu V. Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120).”

4. Where a court proceeds to evaluate evidence by casting a wrong onus on a party the decision is contrary to law for the reason casting of onus is on legal principles and wrong application of a legal principle can be corrected in second appeal. Similarly if evidence is appreciated with reference to wrong principles of law relatable to appreciation of evidence,

the same relates to a question of law and can be corrected in a second appeal.

5. Mukesh Puri, the respondent filed a suit for recovery of Rs.92,234/- stating that he was the sole proprietor of M/s. Karan Enterprises and was carrying on business of sale of machines and spare parts used for manufacture of corrugated boxes. That Sh. Harvinder Singh Bawa, the managing director of the appellant placed an order on him for supply of corrugated machine rolls and gears which were duly supplied and bill No. 120 dated 14.3.1996 in sum of Rs.57,609/- was raised. Subsequently an order for supply of spare parts was placed by Sh. Harvinder Singh Bawa which was executed by him and in respect whereof he raised bill NO. 275 dated 24.3.1996 in sum of Rs.2,000/-. Thus, Rs.59,609/- became due and payable. That no payment was made. That as per the bills he was entitled to interest for late payment @ 18% p.a. That since he served a legal notice upon the defendant he was entitled to be reimbursed Rs.550/- as legal charges. Thus claim made was in sum of Rs.92,334/-.

6. The suit was filed on 12.3.1999.

7. Appellant pleaded in the written statement that it had paid a sum of Rs.25,000/- as advance to the plaintiff by and under cheque No. 463149 dated 26.2.1996 and that no

goods were delivered to it. The sum of Rs.25,000/- remained as advance due. That in April 1998 spares worth Rs.3,000/- were supplied by the plaintiff and while so supplying, the plaintiff acknowledged that Rs.22,000/- were still lying with him to the credit of the appellant. It was pleaded that when order was placed by the appellant for supply of corrugated machine rolls and advance payment of Rs.25,000/- was made it had issued requisite sales tax form No.31. The appellant denied receipt of bill No.120 and 275 or goods thereunder. The appellant laid a counter claim in sum of Rs.22,000/-.

8. Plaintiff examined himself as the sole witness: Appellant examined H.S.Bawa as the sole witness.

9. Plaintiff deposed that goods were sent by him from Delhi to the appellant at Greater Noida (UP) through tempo No. DL-IC-5066 and the two bills Ex. PW-1/1, Ex. PW-1/2 were raised. (Plaintiff proved the carbon copies). He stated that manager of the defendant namely Raja Mohd. signed the office copies of the 2 bills. In cross examination he admitted that since goods had to be delivered outside Delhi the sales tax check post had to be crossed. He stated that he had himself gone to deliver the goods and had insisted the either stamp of the company be affixed on the office copies of the bills or that Mr. H.S.Bawa who was present which delivery was effected

should sign in acknowledgment of having received the goods and the bills, but neither was done. To quote, he stated as under:

“When I supplied the goods the managing director of the company as well as Mr. Raja both were present. I had insisted that either Mr. Bawa should himself accept the goods or the seal of the company be affixed but they did not put the seal and ignored my insistence.”

10. Pertaining to Rs.25,000/- stated in the written statement by the appellant as having been paid as advance money for supply of the goods, Mukesh Puri stated, on cross examination, as under:-

“It is correct that a cheque amount of Rs.25,000/- issued in the name of my firm by the deft. company. That cheque has been credited to the firm's account. It is incorrect to suggest that I have not supplied the goods ordered by the deft. company. It is correct that deft. had given an advance of Rs.25,000/- again said, deft. had cleared the previous account. It is correct that I have not stated in my plaint that this Rs.25,000/- were received against the previous accounts. It is correct that I have not filed any accounts.”

11. H.S.Bawa, the managing director of the appellant appeared as the sole witness of the appellant. In examination in chief he deposed on the lines of the written statement.

12. H.S.Bawa was confronted with three alleged previous bills stated to have been raised by the plaintiff being Ex. DW-1/PX, Ex. DW-1/PY and Ex. PW/PZ. The testimony is as under:-

"My dealing with with the pltff. had started from 1996. I am not aware as to whether I purchased any goods from the pltff. in the year 1995. I have to check from my records whether I purchased goods from the pltff. in the year 1995. I have not brought the record i.e. accounts books. I am produce the accounts books for the year 1995. Again said I have to check from my record as to whether the pltff. supplied goods against their bills copies of which are being filed which are being filed which are Ex. DW-1/P-X Ex.DW-1/PY and DW-1/PZ. It is incorrect that I have not made the payments as I had to check from the record about the receipt of the goods. It is incorrect that when I placed the order in 1996 with the pltff. the pltff. asked me to clear the previous outstanding dues. It is incorrect to suggest that I have paid Rs.25,000/- towards the payment of bills Ex.DW-1/PX to PZ. Volunteered I have paid that Rs.25,000/- as advance to the order placed by me at that time. It is correct that the goods were not received by me for the order which I placed and Rs.25,000/- was given advance. I had given reminders. I had given reminders to the pltff. on telephone but not by writing."

13. It be noted that during trial, the plaintiff served upon the defendant a notice dated 21.7.2000 under Order 12 Rule 8 CPC to produce the original bill i.e. original of Ex. PW-1/1 and Ex. PW-1/2. None were produced for according to the appellant none were received.

14. Discussing the evidence, learned Trial Judge held as under:-

"The plaintiff i.e. PW-1 has stated in his cross-examination that he had supplied the goods at Surajpur (UP) and has stated that EX.PW1/1 does not bear any seal of the defendant company. He has stated that the goods were received on behalf of defendant by a person namely Shri Raja Mofd. who was the accounts manager of the company. He has

admitted to have received an amount of Rs.25,000/- issued in the name of firm by the defendant company. PW-1 has admitted that the defendant had given an advance of Rs.25,00/- . He has again said that the defendant had cleared the previous account and further admitted that he has not stated in his plaint that Rs.25,000/- were received against the previous accounts and also admitted that the plaintiff has not filed any accounts. He has admitted that no written order for the goods was there which he claims to have been supplied.

On the other hand DW-1 Shri H.S.Bawa has denied to have been received any goods. Ex.PW1/1 and PW1/2 does not bear any rubber stamp of the defendant company and the said documents have been denied by the defendant. The legal notice is dated 9.3.1999 and the suit has been filed on 12.3.1999 that is just after three days of the date of legal notice. However, it is pertinent to note that the plaintiff has served the notice U/O 12 R.8 CPC read with Section 66 of Evidence Act, dated 21.7.2000 which is Ex.PW-1/5, on defendant to produce the documents i.e. original bills dated 14.3.1996 and 24.3.1996 and also the original legal notice dated 9.3.1999 and the defendant has failed to produce the same. The plaintiff has also filed the postal receipt as well as the duly received A.D. card. There is no reply to this notice nor the original documents have been produced by the defendant. In view of the above adverse inference is drawn against the defendant and the issues are decided in favour of plaintiff and against the defendant.

In the cross-examination of DW-1 he has stated that his dealings started with the plaintiff from 1996 and he is not aware whether he purchased any goods from the plaintiff in the year 1995. He has further stated that he can produce the account book for the year 1995 and he can tell from the records whether the plaintiff supplied the goods against their bills. The plaintiff has produced three bills dated 10.4.1995, 20.4.1995 & 18.5.1995 which are Ex.DW1/PX to DW1/PZ respectively. The defendant has denied that he has made the payment of

Rs.25,000/- towards the payment of bills Ex.DW/1PX to DW1/PZ. DW-1 has stated in his cross-examination that he has not raised any demand in writing from the plaintiff. DW-1 has stated that there was no person namely Sh.Raja Mohd. in his company in the year 1996 and further stated that prior to 1999 he did not kept any record about his employees and further stated that in 1996 the attendance register was maintained but in 2001 since old records were destroyed by fire in his factory and the factory was completely burnt down. He has stated that apart from attendance register there was no record available. In view of above it is clear that the defendant is making lame exercise and he has in fact received the goods vide said two bills and had not paid Rs.25,000/- as advance but with respect to the bills Ex.DW1/PZ. Now, the plaintiff has already adjusted Rs.25,000/- for the earlier three bills and it is clear that the defendant has received the goods vide bills Ex.PW1/1 and PW1/2, accordingly this issue is decided against the defendant.

From the above findings it is clear that the defendant is not entitled to any relief in his counter claim and further in view of the fact that the defendant has paid Rs.25,000/- against the earlier three bills of the plaintiff and the plaintiff has supplied the goods to the defendant vide bills Ex.PW1/1 and 1/2, the plaintiff is entitled to recover the amount of these two bills and the suit of the plaintiff is accordingly decreed in his favour and against the defendant. The plaintiff is awarded the following reliefs:

- (1) A sum of Rs.59,600/- as principle amount against the outstanding bills.
- (2) Simple interest @ 10% per annum from the date of filing of the suit till realisation."

15. Suffice would it be to note that under-noted reasons

may be culled out from the decision of the learned Trial Judge:

- a. Since appellant failed to produce the original bills carbon copies whereof were Ex. PW-1/1 and Ex. PW-1/2 inspite

of service of Ex. PW-1/5 i.e. notice to produce issued by the plaintiff under Order 12 Rule 8 CPC an adverse inference had to be drawn against the appellant.

b. Appellant not having produced a register of employee working at its factory an adverse inference had to be drawn against the appellant pertaining to Raja Mohd. its stated manager who has ostensibly signed Ex. PW-1/1 and Ex. PW-1/2.

c. Appellant not having raised any demand pertaining to non supply of goods for which it claimed having paid Rs.25,000/- as advance payment was a fact wherefrom an adverse inference could be drawn that Rs.25,000/- was not outstanding towards it for non supply of goods by the plaintiff. Additionally Ex. DW-1/PX to PZ i.e. the 3 bills produced by the plaintiff evidence that appellant had to pay money under said bills and that it could reasonably be presumed that the plaintiff received Rs.25,000/- for payment under said three pending bills.

16. Before the first Appellate Court it was urged by the appellant that:

a) Since appellant had denied receipt of the bills carbon copies whereof were Ex. PW-1/1 and Ex. PW-1/2 no adverse inference could be drawn against it

for not producing the 2 bills when notice under Order 12 Rule 8, Ex. PW-1/5 was served upon it. It was urged that before an adverse inference could be drawn against a party for not producing a document the sine qua non was to establish that said document(s) was/were in the possession of the party. That this condition precedent fact was not proved.

- b) That sale was inter city. Admittedly sales tax barrier had been crossed in transit. There was no endorsement on Ex. PW-1/1 and Ex. PW-1/2 by the sale tax officials at the transit post of goods having crossed the transit post. Hence it was not proved that the goods were transported into UP from Delhi.

17. The Appellate Court dismissed the appeal and returned a finding as under:-

“9. Regarding first submission made by learned counsel for the appellant in respect of endorsement of sales tax of U.P. on bill Ex.PW1/1 & 2, it is seen that the goods sent through the aforesaid bills by respondent were v duly received by employee of the appellant, namely, Shri Raja Mohd. Though there was denial by the appellant of the receipt of the goods by Raja Mohd. Because no person in the said name ever worked with the appellant. It is strange that the appellant failed to produce the attendance and wages register of its employees for the reasons best known to the appellant. Non-production of said record about the employees working with appellant

goes against the appellant for which the Trial Court rightly drew adverse inference against the appellant because if the said record had been produced that would definitely have gone against it. Regarding payment of advance amount of Rs.25,000/- by the appellant to the respondent, the respondent had categorically stated that goods for the said amount was already supplied to the appellants towards bill EX.DW1/PX to Ex.DW1/PZ. It is amazing that the appellant failed to produce any record such as accounts books pertaining to the previous years which could have dispelled all doubts. It is also interesting that the appellant did not take trouble to serve the respondent with any legal notice for non supply of any goods against advance payment of Rs.25,000/-. Thus, the plea taken by the appellant about advance payment of Rs.25,000/- appears to be an after-thought and had been not supported by any evidence.

10. Keeping in view the discussion above, I am of the opinion that the impugned order does not suffer from any infirmity. I also do not find any perversity in the order passed by the learned Civil Judge. Accordingly, appeal filed by the appellant is dismissal being devoid of any merit."

18. It may be noted at the outset that the first Appellate Court has not discussed the issue pertaining to reasoning (a) (noted in para 15 above) of the learned Trial Judge pertaining to Ex. PW-1/5. The Appellate Court has dealt with reasoning b and c (noted in para 15 above) of the learned Trial Judge. Further, non endorsement on Ex. PW-1/1 and Ex. PW-1/2 by the UP sales tax officials manning the sales tax post at Delhi-U.P. border has not been discussed by the first Appellate Court.

19. Indeed, if a party denies receipt of a document and pleads that the same is not in its possession, unless it is

proved that the same was in its possession, no adverse inference can be drawn against the party for non production thereof.

20. But, as noted above, learned Trial Court has, after analysing the evidence, given 3 reasons in support of its conclusions. First reason has not been discussed by the learned Appellate Judge. The other 2 reasons have found favour with the Appellate Judge.

21. The second appeal requires this court to consider whether the 2nd and 3rd reason given by the learned Trial Judge, affirmed by the Appellate Judge, are sufficient to uphold the decisions of the court below.

22. I think, they do.

23. First and foremost is the admission of the appellant that it had issued Form No.31 under the sales tax law for inter state sale of the goods. The appellant has not spoken a word that since it did not receive the goods it sought return of said form. A reasonable inference can be drawn that the said form was duly utilized for sales tax purposes. Appellant's plea that Ex. PW-1/1 and Ex. PW-1/2 did not bear the endorsement of the sales tax department when goods crossed the Delhi-U.P. border is neither here nor there for the reason the said exhibits were carbon/office copies of the bills. The original endorsement had

to be on the original bills.

24. Secondly, appellant did not produce its books of accounts. It may be noted that appellant justified not producing the register of employees by stating that due to fire in the factory in the year 2001 some record including the attendance register for the year 1996 was destroyed, but did not say that the account books for said year and the year 1995 was destroyed in the fire. If indeed, Rs.25,000/- was paid as advance and not towards Ex. DW-1/PX to PZ and no goods were supplied against the advance, the conduct of the appellant is suspicious as rightly held by both courts.

25. Contention of learned counsel for the appellant that plaintiff's testimony that he insisted on the appellant affixing its seal on Ex. PW-1/1 and Ex. PW-1/2 or managing director of the appellant signing the bills but neither was done and in spite thereof plaintiff being satisfied with Raja Mohd. signing the two bills is contrary to human conduct be noted and dealt with.

26. It was a petty trade. People in India and especially those engaged in petty trade are known for un-officious conduct. The plaintiff had carried the goods from Delhi to Greater Noida. Re-import to Delhi would have required a lot of paper work relating to sales tax. The plaintiff had 2 choices. Firstly to bring back the goods, an exercise which required lot

of paper work. Secondly to trust the appellant to be honest. I find nothing abnormal in the plaintiff opting for the second alternative.

27. I do not find that the appraisal of evidence and in particular pertaining to reasons 'b' and 'c' recorded by the Trial Judge suffers from a material irregularity or is based on inadmissible evidence or on conjectures or surmises. The said 2 reasons by themselves and cumulatively are sufficient to sustain the finds returned. Pertaining to what happened to the original bills, it may be noted that evidence probablizes that they were delivered to the appellant. The silence of the appellant pertaining to Form No.31 which it admittedly issued pertaining to the bill Ex. PW-1/1 gives rise to an inference that the form was duly accounted for in relation to sales tax pertaining to the sale of goods covered by the bill Ex. PW-1/1.

28. Before concluding I may note that the respondent did not urge on the maintainability of the appeal. Nor did it urge on the maintainability of the first appeal.

29. It has to be noted that appellant's counter claim was dismissed when respondent's suit was allowed. The judgment and decree may be factually one but conceptually it had to be two. The suit of the respondent was decreed and counter claim was dismissed. As per law a counter claim is treated as a suit.

Thus 2 appeals had to be filed.

30. The single appeal, both first and second, are arguably not maintainable. Order 41 Rule 1 reads as under:-

“Form of appeal – What to accompany memorandum – (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment.”

31. Since issue was not raised I leave it at that.

32. The appeal is dismissed.

33. Cost awarded in favour of the respondent and against the appellant in sum of Rs.5,000/-.

34. LCR be returned.

December 12, 2007
MM

PRADEEP NANDRAJOG
JUDGE